

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANNA M. BAKER KHEEL, a married woman,) NO. CV-05-0238-LRS
Plaintiff,)
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS
-vs-)
STONE STREET, CAPITAL INC., a)
Pennsylvania Corporation;)
SETTLEMENT CAPITAL CORPORATION,)
a Texas Corporation; NEAL J.)
MARKOWITZ, attorney at law, and)
JANE DOE MARKOWITZ, and their)
marital community,)
Defendants.)

BEFORE THE COURT ARE Defendant Settlement Capital Corp.'s Motion to Dismiss Plaintiff's Complaint based on the statute of limitations. (**Ct. Rec. 24**) ; Defendant Stone Street Capital's Motion to Dismiss and Joinder in Motion to Dismiss (**Ct. Rec. 27**) ; Stone Street Capital's Amended Motion to Dismiss and Joinder in Motion to Dismiss filed by Defendant Settlement Capital Corporation (**Ct. Rec. 28**) , and Defendant Settlement Capital Corporation's Motion to Strike Ms. Kheel's declaration (**Ct. Rec. 35**) .

These motions were argued orally on August 3, 2006. Breean Beggs participated on behalf of the Plaintiff, David E. Eash and Brian W. Esler participated on behalf of the Defendants.¹ After careful review of the

¹Defendants for purposes of this motion refers to Settlement Capital and Stone Street Capital. It does not include Neal Markowitz. At this

1 pleadings submitted by all parties and with the benefit of oral argument,
 2 this order will memorialize and supplement the oral rulings of the Court
 3 on that date, which are incorporated herein by reference.

4 The Court finds that the Defendants are entitled to dismissal of all
 5 of Ms. Kheel's claims with the exception of the allegations of late
 6 payments to Ms. Kheel and the alleged missed payment in January 2003.
 7 Complaint at ¶ 31.² These claims remain viable.

8 I. BACKGROUND

9 Plaintiff Anna Kheel filed this lawsuit in Stevens County on June
 10 23, 2005. Notice of Removal (Ct. Rec. 1) at 2. Defendants removed the
 11 case to federal court. This case stems from the sale of a portion of a
 12 structured settlement to the Defendants. Plaintiff was seriously injured
 13 in an automobile accident in 1991, which resulted in a structured
 14 settlement with an annuity. Complaint (Ct. Rec. 1) at ¶9-13. Pursuant to
 15 the annuity contract between Plaintiff and Safeco Life & Investments, the
 16 Plaintiff was to receive \$2,000 per month until 2017 with similar
 17 payments thereafter for her life. Complaint at ¶13. In Spring 2001,
 18 Plaintiff was approached by Settlement Capital, through its agent, Stone
 19 Street Capital, for the purpose of purchasing a portion of the annuity.
 20 Complaint ¶15-17, 24. At that time, Stone Street offered to purchase a
 21 portion of her annuity payments, \$1,200 per month from July 21, 2001
 22 through June 20, 2011. Complaint at ¶19. On June 5, 2001, Defendant

23
 24 juncture, it is unclear whether Mr. Markowitz has been served. He is not
 25 currently represented.

26 ²The Court notes that Defendants did not address these allegations in
 their motion to dismiss.

1 Settlement Capital purchased a portion of Plaintiff's future payments in
2 the structured settlement. The partial annuity was purchased for a lump
3 sum of \$60,190. Pursuant to the agreement, Defendant Settlement Capital
4 currently receives the entire \$2,000 a month from Safeco Insurance, and
5 Defendant Settlement Capital is required to send Ms. Kheel \$800 per
6 month. Complaint at ¶29-30. It is undisputed that Ms. Kheel signed the
7 contract on May 29, 2001. Settlement Capital signed the contract on June
8 4, 2001. The contract stated that its effective date was June 5, 2001.
9

10 Before entering the agreement, someone from either Stone Street or
11 Settlement Capital had Mr. Markowitz call the Plaintiff to answer her
12 legal questions about the contract agreement. Complaint at ¶ 34-36. Ms.
13 Kheel now claims she did not know that Mr. Markowitz represented the
14 interests of Stone Street and/or Defendant Settlement Capital. Complaint
15 ¶36-37; Plaintiff's Declaration in Opposition to Motion to Dismiss (Ct.
16 Rec. 33) at ¶17. Plaintiff claims that she did not "fully understand the
17 nature and consequences of the contract" that she entered into until
18 January 2003 when an attorney made her aware that she had a potential
19 cause of action. Complaint at ¶39.

20 In her Complaint, Plaintiff states that she completed the eighth
21 grade, and later received her GED. Complaint at ¶7. She further claims
22 that the financial obligations were not fully explained to her. Complaint
23 at ¶22. In her declaration supporting Plaintiff's Opposition to the
24 Motion to Dismiss,(Ct. Rec. 33), Plaintiff claims she has a reading
25 disability, and has difficulty understanding the written word. *Id* at ¶3.

26 Plaintiff claims that the Defendants in this case committed common

1 law fraud, and material misrepresentation, violated the Washington State
2 Consumer Protection Act as well as breached the contract. In addition,
3 Plaintiff asserts that she has claims for unconscionability and undue
4 influence as well as violated the duty of good faith and fair dealing.
5 Plaintiff also claims legal malpractice against Neal Markowitz, an
6 attorney she claims the Defendants provided for her. See Complaint.
7 Plaintiff sought injunctive relief, attorneys fees and damages. *Id* at 11.
8

II. LEGAL STANDARD

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10 In reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a
11 court may grant a dismissal for failure to state a claim "if it appears
12 beyond doubt that the plaintiff can prove no set of facts in support of
13 his claim that would entitle him to relief." *Keniston v. Roberts*, 717
14 F.2d 1295, 1300 (9th Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41,
15 45-46 (1957)). "Dismissal can be based on the lack of a cognizable legal
16 theory or the absence of sufficient facts alleged under a cognizable
17 theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th
18 Cir. 1988).

19 On a motion to dismiss, material allegations of the complaint are
20 taken as admitted and the complaint is to be liberally construed in favor
21 of the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), *reh'g
denied*, 396 U.S. 869 (1969); *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th
22 Cir. 1977). A motion to dismiss only admits, for the purposes of the
23 motion, all well pleaded facts in the complaint, as distinguished from
24 conclusory allegations. *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir.
25 1976); see also *Jones v. Community Redevelopment Agency*, 733 F.2d 646,
26

1 649 (9th Cir. 1984) (conclusory allegations unsupported by facts are
 2 insufficient to state a claim under 42 U.S.C. § 1983).

3 III. DISCUSSION

4 As this Court stated on the record, all Plaintiff's claims, with the
 5 exception of those against Mr. Markowitz, consist of either conversations
 6 she had with various people before signing the contract, or the terms and
 7 information contained in the contract and its clauses. It appears that
 8 there were no facts underlying her claims of which she was not aware
 9 prior to the signing of the contract. Washington follows the general
 10 contract principle that parties have a duty to read the contracts they
 11 sign. *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 385 (2004). As
 12 Defendants point out, Courts presume that parties to an agreement have
 13 read all parts of the entire contract and intend what is stated in
 14 objective terms." *West Coast Stationery v. Kennewick*, 39 Wn. App. 466,
 15 470 (1985).

16 A. Consumer Protection Act Claims

17 Plaintiff claims Defendants violated the Washington State Consumer
 18 Protection Act. In order to show a violation of the Consumer Protection
 19 Act, five elements must be met:(1) an unfair or deceptive act or
 20 practice; (2) occurring in trade or commerce; (3) public interest impact;
 21 (4) injury to the plaintiff's business or property; and (5) causation .
 22 RCW 19.86.020; *Burbo v. Harley C. Douglass, Inc.* 125 Wash.App. 684,
 23 (2005). The statute of limitations for consumer protection act claims
 24 is **four** years. RCW 19.86.120. The record establishes that the contract
 25 was signed more than four years before Ms. Kheel filed suit, therefore,
 26 Plaintiff's claims are barred by the statute of limitations, and

therefore must be **DISMISSED**.

B. Fraud Claims

Counts 1, 6, and 7 of Ms. Kheel's Complaint allege fraud. The statute of limitations for fraud claims is three years. Plaintiff claims that the statute of limitations should be tolled by the discovery rule because she did not know she had a legal cause of action until January 2003 when she conferred with an attorney. Plaintiff's Response (Ct. Rec. 32-1) at 12. The statute of limitations begins to run when a party knows, or in the exercise of due diligence, should have known" of the **facts** constituting her claim," *Giraund v. Quincy Farm and Chemical*, 102 Wn.App. 443, 449. (2000). See also *Cawdrey v. Hanson Baker*, 129 Wn.App. 810, 816 (2005). As Washington case law makes clear, the discovery rule is a factual rule, not a legal one. Therefore, Plaintiff need not understand at the time that she has a legal cause of action in order for the statute of limitations to begin to run. The record established that Ms. Kheel filed her Complaint more than four years after signing the contract. Moreover, the discovery rule requires the exercise of due diligence and will not be applied where the Plaintiff has ready access to the information upon which the claim is asserted. *Metropolitan Servs. Inc v. Spokane*, 32 Wn.App. 714 (1982), review denied, 98 Wn.2d 1008 (1982). For these reasons, the discovery rule does not apply in this instance.³

C. Unconscionability, Undue Influence and Breach of Good Faith

³Plaintiff also argued that she should be allowed to amend her Complaint to plead fraud with particularity. Plaintiff's Response to Defendant's Motion to Dismiss (Ct. Rec. 32-1) at 9. However, this would not change the Court's analysis of her claims. In oral argument, Plaintiff's counsel could not point to any fact that would support Plaintiff's fraud or material misrepresentation claims as to these Defendants, which had not been included in her original complaint.

1 In responding to Defendants' Motion to Dismiss, Ms. Kheel argues that
2 her claims of unconscionability, undue influence, and breach of the duty
3 of good faith and fair dealing are subject to the six-year statute of
4 limitations for breach of contract. However, in Plaintiff's Complaint she
5 stated that her claims for unconscionability and breach of good faith/fair
6 dealing arose under the Uniform Commercial Code. See Complaint at Count
7 VII, ¶ 96-101. The Washington U.C.C. has a four year statute of
8 limitations. In addition, the discovery rule does not apply to
9 transactions under the U.C.C. RCW 62A.2-725. Even if, arguendo,
10 Plaintiff's claim is correct, it is undisputed that the only remedy for
11 those three claims would be recission. See Plaintiff's Response (Ct. Rec.
12 32-1 at 15-18. However, the record reflects that Plaintiff did not inform
13 Defendants of her intent to rescind the contract for more than four years.
14 Plaintiff's lengthy silence waives the right to rescind. See *Fines v. West
15 Side Implement Co*, 56 Wn.2d 304, 310 (1960).

16 For the reasons explained on the record on August 3, 2006, as well
17 as in this Order, it is **HEREBY ORDERED**:

- 18 1. Defendant Settlement Capital Corp's **Motion to Dismiss** Plaintiff's
19 Complaint based on the statute of limitations (**Ct. Rec. 24**) is **GRANTED**.
- 20 2. Defendant Stone Street Capital's Motion to Dismiss and Joinder in
21 Motion to Dismiss (**Ct. Rec. 27**) is **GRANTED**.
- 22 3. The Amended Motion to Dismiss and Joinder in Motion to Dismiss filed
23 by Defendant Settlement Capital Corporation (**Ct. Rec. 28**) is **GRANTED**;
- 24 4. The Court finds that the Defendants Settlement Capital and Stone
25 Street are entitled to **DISMISSAL WITH PREJUDICE** of all of Ms. Kheel's
26 claims with the exception of the allegations of late payments to Ms. Kheel

1 and the alleged missed payment in January 2003, which were not the subject
2 of the motions to dismiss. This Order does not address any of the claims
3 against Mr. Neal Markowitz or Jane Doe Markowitz.

4 5. Defendant's Motion to Strike Ms. Kheel's declaration (**Ct. Rec. 35**)
5 is **DENIED**. The Court considered Ms. Kheel's declaration.

6 **IT IS SO ORDERED**. The District Court Executive is directed to file
7 this Order and provide copies to counsel.

8 **DATED** this 26th day of October, 2006.

9 *s/Lonny R. Suko*
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11 LONNY R. SUKO
12 UNITED STATES DISTRICT JUDGE

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